INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	3
Statement	3
Argument	7
Conclusion	15
Appendix A	16
Appendix B	23

CITATIONS

Cases:

Bowles v. *Franceschini*, 145 F. 2d 510	8
Bowles v. *Hastings*, 146 F. 2d 94	8
Bowles v. *Insel*, 148 F. 2d 91	14
Bowles v. *Seminole Rock and Sand Co.*, 145 F. 2d 482, certiorari granted, No. 914, this Term	8
Boyd v. *United States*, 116 U. S. 616	13
Brown v. *United States*, 276 U. S. 134	13
Clyde v. *Broderick*, 144 F. 2d 348	10
Continental Collieries v. *Shober*, 130 F. 2d 631	10
Consolidated Rendering Co. v. *Vermont*, 207 U. S. 541	13
Deckert v. *Independence Corp.*, 311 U. S. 282	10
Dioguardi v. *Durning*, 139 F. 2d 774	10
Federal Trade Commission v. *American Tobacco Co.*, 264 U. S. 298	13
Fleming v. *Montgomery Ward & Co.*, 114 F. 2d 384, certiorari denied, 311 U. S. 690	14
A. Guckenheimer & Bros. Co. v. *United States*, 3 F. 2d 786, certiorari denied, 268 U. S. 688	13
Hale v. *Henkel*, 201 U. S. 43	13
Lightbody v. *Russell*, 293 N. Y. 492	8
Robinson v. *United States*, No. 514, this Term	9
Rodgers v. *United States*, 138 F. 2d 992	14
Sana Laboratories, In re, 115 F. 2d 717	12
Speten v. *Bowles*, 146 F. 2d 602, certiorari denied, April 23, 1945	8
C. M. Spring Drug Co. v. *United States*, 12 F. 2d 852	13
United States v. *Mulligan*, 268 Fed. 893	13
United States v. *Powers*, 307 U. S. 214	8
United States v. *Ragen*, 314 U. S. 513	9
United States v. *Sherry*, 294 Fed. 684	13
Wheeler v. *United States*, 226 U. S. 478	14
Wilson v. *United States*, 221 U. S. 361	14

Statutes: Page

Emergency Price Control Act of 1942, 56 Stat. 23, 50 U. S. C. (Supp. III) 901:
- Section 2 ... 16
- Section 202 (a) ... 16
- Section 202 (b) ... 11, 16
- Section 205 (e) ... 17

Stabilization Extension Act of 1944, 58 Stat. 640, 50 U. S. C. A. App. 925(e):
- Section 108(b) ... 17
- Section 108(c) ... 19

Miscellaneous:

General Maximum Price Regulations (7 F. R. 3153, 8 F.R. 3096):
- Section 1499.2 ... 19
- Section 1499.11 ... 20
- Section 1499.12 ... 12, 21
- Section 1499.13 ... 21

Maximum Price Regulation No. 215 (8 F. R. 8705), Section 15 ... 12, 22

Rules of Civil Procedure, Rule 12(e) ... 10

S. Rep. No. 931, 77th Cong., 2d Sess ... 8

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1213

GLICK BROTHERS LUMBER COMPANY, A CALIFORNIA CORPORATION, MAX GLICK, OSCAR GLICK, ADOLPH GLICK, DAVID GLICK, ISRAEL GLICK, AND LABEL GLICK, INDIVIDUALLY AND DOING BUSINESS AS GLICK BROTHERS LUMBER COMPANY, PETITIONERS

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum, findings of fact and conclusions of law of the district court (R. 161–173, 179–195) are not reported. The opinion of the circuit court of appeals (R. 479–492) is reported in 146 F. 2d 566.

JURISDICTION

The judgment of the circuit court of appeals was entered on January 4, 1945 (R. 492). A petition

for rehearing, filed on March 15, 1945, was denied on March 26, 1945 (R. 493). The petition for a writ of certiorari was filed on April 27, 1945, and the jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the statutory right of action under Section 205 (e) of the Emergency Price Control Act of 1942, as extended by the Stabilization Extension Act of 1944, is constitutionally vested in the Administrator when the commodity, the sale of which gives rise to the cause of action, is purchased for use or consumption in the course of trade or business.

2. Whether the complaint in this case should have been dismissed for indefiniteness.

3. Whether, on appeal from the district court judgment dismissing the complaint and from the order of that court suppressing evidence obtained by the Office of Price Administration, the circuit court of appeals had jurisdiction to reverse the order of suppression as well as the judgment of dismissal.

4. Whether the inspection of records which are kept pursuant to the mandate of the Emergency Price Control Act of 1942 constitutes an unreasonable search and seizure when carried on by duly authorized law enforcement officers acting without process but under statutory authority.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the statutes and regulations involved are set out in Appendix A, *infra*, pp. 16–22.

STATEMENT

On October 1, 1943, this action was brought by the Price Administrator against petitioners Glick Brothers Lumber Company, a California corporation, and its officers and stockholders under Section 205 (e) of the Act. The complaint was in three counts. In the first and third counts, the Price Administrator alleged that during the year ending September 30, 1943, the petitioners had sold lumber at prices in excess of those permitted by the General Maximum Price Regulation (Appendix A, *infra*, p. 19). In the second count, it was alleged that during the same period petitioners had sold lumber at prices in excess of those permitted by Maximum Price Regulation No. 215 (Appendix A, *infra*, p. 22). The complaint stated that none of the lumber alleged to have been sold at excessive prices was purchased by the respective buyers for use or consumption other than in the course of trade or business. A judgment was asked in the sum of $34,695.18, being three times the amount by which the prices charged by petitioners exceeded the maximum prices permitted by the applicable regulation. (R. 2–6.)

Petitioners moved to strike the complaint and dismiss the action (R. 11–12, 15–16). Petitioners also moved to suppress evidence gathered by Office of

Price Administration investigators on the ground that it had been obtained by an unlawful search and seizure in violation of rights guaranteed petitioners by the Fourth and Fifth Amendments to the Constitution of the United States (R. 6–10, 12–14).

The motion to suppress the evidence was heard on sharply conflicting affidavits (R. 17–148). It is undisputed, however, that on June 1, 1943, two investigators of the Office of Price Administration called at petitioners' place of business, and after displaying their credentials, requested permission of the Lumber Company's general manager, Max Glick, to inspect its invoices of sales and purchases of lumber (R. 27, 28, 40, 49). It is further agreed that the petitioners made the invoices available to them and assigned them a room at petitioners' office in which they might inspect these papers (R. 27, 38, 50). The investigators swore that petitioners did so voluntarily. Petitioners, on the other hand, swore that they did so because the investigators told them that they would make things "awfully tough" for petitioners if the records were not made available (R. 49) (a charge denied by the investigators (R. 114, 133)) and because they (petitioners and their employees) were "inspired by fear and apprehension of the great and almost unlimited power of the Office of Price Administration and of its officers and agents", and thought that "serious and dire consequences" would result if they failed to comply with the investigators' request (R. 49, 63).

The investigation was conducted from on or about

June 1, 1943, to and including June 15, 1943, and from July 26, 1943 to August 15, 1943 (R. 31). Thereafter, there were a few sporadic visits until September 15, 1943 (R. 74). During the entire time that the investigation was in progress, no objection was made by petitioners to the investigators' examination of the invoices until August 13, 1943, when petitioners served a notice on the investigators and on the Office of Price Administration objecting to the investigation as an illegal search and seizure (R. 57, 72, 83, 94, 103). A similar notice was served on September 10, 1943 (R. 60, 96, 104). Until the service of the notice of August 13, 1943, there is nothing in any of the affidavits tending to show that the investigation was not conducted with the acquiescence of petitioners.

During the course of the investigation, certain delivery slips and invoices containing alterations and interlineations which could not be accurately shown by the ordinary process of copying were taken out of petitioners' office and photostated. The originals were returned promptly thereafter. (R. 31.) Petitioners claimed that the removal and photostating was done without their knowledge or consent (R. 18, 22, 25, 65). The photostatic copies, however, were produced and discussed in detail at conferences held from time to time with petitioners and their counsel (R. 85–86) and no objections were made as to the fact and manner of their procurement (R. 32–34, 42–45, 57, 83).

The major part of the affidavits submitted by petitioners relates not to the investigation of petitioners'

records, but to six or more conferences and interviews between the petitioners and their representatives on the one hand and representatives of the Office of Price Administration on the other, at which the liability of the petitioners was discussed. All of these conferences took place while the investigation was in progress. (R. 32–35.) The petitioners assert that the representatives of the Office of Price Administration acted at these conferences in a high-handed and intimidating manner, demanding of the defendants sums varying from $25,000 to $90,000. As a result, it was alleged that the individual petitioners suffered various forms of nervous and physical disabilities. (R. 67, 71, 80, 81.) Almost every allegation contained in the affidavits submitted by the petitioners as to what occurred at the conferences is denied by affidavit submitted by the respondent (R. 27, 38, 105, 124). Specifically, all allegations as to threats, intimidation, coercion, and high-handedness are unequivocally denied (R. 35, 36, 46, 106–107, 108–109, 115–116, 119, 121–122, 125–126, 127–128, 129–130, 134). At least from the time of the first conference, the petitioners were represented by counsel (R. 85–86).

On these sharply conflicting affidavits and without hearing any oral evidence, although respondent's investigators were present in court and respondent at three different times requested that they be heard (R. 293, 316, 421), the district court adopted findings of fact consisting of a summary of the facts alleged in the affidavits submitted by petitioners, and sustained the motion to suppress the evidence (R. 179–195). The

court order provided that all documents taken from petitioners' files should be returned along with any copies made thereof, and that "the United States of America is barred from using any such invoices, bills, records, data or information, or any matters obtained therefrom, directly or indirectly, in any court or any proceeding of any kind or character whatsoever" (R. 194–195). At the same time, the court sustained petitioners' motion to dismiss the complaint (R. 196–198).

The Administrator appealed from both judgments (R. 199). A stay of the order suppressing the evidence having been denied by the district court (R. 469), the Administrator applied to the circuit court of appeals for a suspension of that order pending appeal. That court ordered all of the evidence which the district court had ordered suppressed impounded (R. 200). Pursuant to this order, the Administrator deposited all of the evidence with the Clerk of the district court whose receipt therefor is printed as Appendix B of this brief (*infra*, pp. 23–26). The circuit court of appeals reversed both the judgment of dismissal and the order suppressing the evidence (R. 492–493).

ARGUMENT

1. The holding of the court below that Section 205 (e) of the Emergency Price Control Act of 1942 (Appendix A, *infra*, p. 17) vests in the Administrator the right to sue alleged violators when the commodity is purchased for use or consumption in the course of trade or business is compelled by the

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plain words of the statute.[1] Moreover, the legislative history is unequivocal. The Senate Committee stated that Section 205 (e) "will permit private purchasers who buy for private use or consumption, rather than in the course of trade or business, to protect themselves against violations of the act"; "if a buyer * * * is not entitled to bring such action, because he is a buyer in the course of trade or business, or for other reasons the Administrator may bring such action against the seller on behalf of the United States." S. Rep. No. 931, 77th Cong., 2d Sess., pp. 8, 26.

Thus the appellate courts to which this problem has been presented have consistently taken the same view of the Administrator's standing as that taken by the court below. *Lightbody* v. *Russell*, 293 N. Y. 492; *Bowles* v. *Franceschini*, 145 F. 2d 510 (C. C. A. 1); *Bowles* v. *Seminole Rock and Sand Co.*, 145 F. 2d 482 (C. C. A. 5), certiorari granted on another issue, No. 914, this Term; cf. *Speten* v. *Bowles*, 146 F. 2d 602 (C. C. A. 8), certiorari denied, April 23, 1945; *Bowles* v. *Hastings*, 146 F. 2d 94 (C. C. A. 5).

The petition for a writ of certiorari in *Speten* v. *Bowles*, No. 999, this Term, raised an issue much like that here involved, and we respectfully refer the Court to the Brief in Opposition filed in that

[1] A reading of Section 108 (b) and (c) of the Stabilization Extension Act of 1944 (Appendix A, *infra*, pp. 17–19) makes it clear that that Act does not deprive the Administrator of this right. Compare *Speten* v. *Bowles*, 146 F. 2d 602, 605 (C. C. A. 8), certiorari denied, April 23, 1945. See also *United States* v. *Powers*, 307 U. S. 214.

case, not only for an analysis of the purpose of the "standing" provisions of the statute (pp. 5–7), but also for what, we submit, is a complete answer to petitioners' argument in this case (Br. 76) that the statute is void if it does vest in the Administrator the right of action here claimed (No. 999, Br. in Opp. 8–9).

Petitioners' remaining constitutional objection to Section 205 (e) is that the provision for suit by the Administrator when the commodity is not sold "for use or consumption other than in the course of trade or business" is too vague and indefinite (Br. 77–83). Granting, *arguendo*, petitioners' assumption that this is a "vague" provision, we submit that its invalidity does not follow. The asserted ambiguity does not leave petitioners or anyone else in any doubt as to whether a given act or omission is illegal under the Act and the regulations issued pursuant to its provisions. Cf. *United States* v. *Ragen*, 314 U. S. 513. If a price regulation is violated, the violator is subject to suit, and he is not deprived of any constitutional right even if he cannot tell whether the plaintiff in such a suit will be the Administrator or the purchaser. Such a doubt is of no constitutional moment. Cf. *Robinson* v. *United States*, No. 514, this Term, slip opinion, pp. 3–4.

2. The court below committed no error in holding that "indefiniteness of the complaint is not a ground for dismissal" (R. 480). If petitioners find the complaint unenlightening as to the details of their alleged violation, their remedy will be to move for a more

definite statement or for a bill of particulars under Rule 12 (e) of the Rules of Civil Procedure. Conceivably, a complaint may be so vague and indefinite as to fail to state a claim upon which relief may be granted, but no such case is presented here. The complaint is manifestly sufficient to withstand a motion to dismiss. *Clyde* v. *Broderick*, 144 F. 2d 348 (C. C. A. 10); *Continental Collieries* v. *Shober*, 130 F. 2d 631, 635 (C. C. A. 3); *Dioguardi* v. *Durning*, 139 F. 2d 774 (C. C. A. 2).

3. Concededly having the power to reverse the judgment of the district court dismissing the complaint, the circuit court of appeals undoubtedly had the power, at the same time, to reverse the order suppressing the evidence. In *Deckert* v. *Independence Corp.*, 311 U. S. 282, 287, the circuit court of appeals concededly had the power to hear an appeal from the issuance of a temporary injunction, and this Court held, in accordance with a long line of authority, that the circuit court of appeals could also pass on the denial by the district court of a motion to dismiss, although such a denial would not ordinarily be appealable. To deny to the court below the power to deal with the motion to suppress the evidence would merely make for delay and give rise to no compensating advantages. With the case before the circuit court of appeals, efficient judicial administration required that the trial court be guided as fully as was possible at that stage of the proceeding. In any event, this jurisdictional question is entirely academic, since, on remand, the district court, in

deference to the views of the circuit court of appeals, will undoubtedly set aside its order of suppression.

4. Insofar as it pertains to the right of the Administrator and his representatives to inspect records, the ruling of the court below is of very limited and narrow application. Contrary to petitioners' extravagant claims, it does not hold, either expressly or by implication, that "everybody's records are quasi public records, whether in their private vault" (Br. 61) or that "the provisions of the Emergency Price Control Act of 1942 permit any investigators [of the Office of Price Administration] to go into any man's place of business and rummage at will" (Br. 56), or that the Fourth and Fifth Amendments afford less protection, or should be construed more narrowly, in war than in peace. It does not sanction or approve "fishing expeditions" or "exploratory searches", or any other invasion of the rights and liberties guaranteed by the Bill of Rights.

Section 202 (b) of the Price Control Act (Appendix A, *infra* p. 16) authorizes the Administrator

> by regulation or order, to require any person who is engaged in the business of dealing with any commodity * * * to furnish [such information as he deems necessary or proper to assist him in the administration and enforcement of this Act (Section 202 (a))] under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents * * *.

Section 1499.12 of the General Maximum Price Regulation (Appendix A, *infra*, p. 21) provides that:

> Every person selling commodities or services for which, upon sale by that person, maximum prices are established by this Regulation, shall keep, and make available for examination by the Office of Price Administration, records of the same kind as he has customarily kept, relating to the prices which he charged for such of those commodities or services as he sold after the effective date of this Regulation; and, in addition, records showing, as precisely as possible, the basis upon which he determined maximum prices for those commodities or services.

In addition, Section 15 of Maximum Price Regulation No. 215, applying specifically to the lumber industry, more particularly describes the records that must be kept (Appendix A, *infra*, p. 22).

Relying on these provisions, the decision below goes no further than to hold that the examination and inspection, by duly authorized law enforcement officers acting without process but under statutory authority, of records which are required to be prepared and kept subject to inspection by a valid law, does not constitute an unlawful search or seizure or invade any rights guaranteed by the Fourth and Fifth Amendments. In so holding, the decision is in accord with the decisions of all other appellate courts that have passed on the question.[2] *In re Sana Labo-*

[2] The principle on which the decision is founded was recognized in the opinions of this Court on which petitioners rely

ratories, 115 F. 2d 717, 718 (C. C. A. 3); *C. M. Spring Drug Co.* v. *United States*, 12 F. 2d 852, 857 (C. C. A. 8); *A. Guckenheimer & Bros. Co.* v. *United States*, 3 F. 2d 786, 789 (C. C. A. 3), certiorari denied, 268 U. S. 688; and see *United States* v. *Sherry*, 294 Fed. 684 (E. D. Ill.); *United States* v. *Mulligan*, 268 Fed. 893 (N. D. N. Y.).

The investigation involved in this case was not, as petitioners assert, a general exploratory search or "fishing expedition" such as were condemned in *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, and *Hale* v. *Henkel*, 201 U. S. 43. It was limited to records relating to the sale of lumber during a limited period of time. Such a restricted examination on the corporate premises is not shown to have interfered unreasonably with the conduct of the lumber company's business. *Brown* v. *United States*, 276 U. S. 134; *Consolidated Rendering Co.* v.

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most heavily. Thus in *Boyd* v. *United States*, 116 U. S. 616, 623–624, this Court said:

"So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, *and the entries thereof in books required by law to be kept for their inspection*, are necessarily excepted out of the category of unreasonable searches and seizures." [Italics supplied.]

Again, in *Hale* v. *Henkel*, 201 U. S. 43, 77, this Court said:

"Of course, in view of the power of Congress over interstate commerce * * * we do not wish to be understood as holding that an examination of the books of a corporation, if duly authorized by act of Congress, would constitute an unreasonable search and seizure within the Fourth Amendment."

Vermont, 207 U. S. 541; *Wheeler* v. *United States*, 226 U. S. 478.

The investigation did not extend, moreover, to any private papers of petitioners. It was confined to records which petitioners were required by law to prepare and keep.[3] Records so required to be prepared and kept are, as the court below held, quasi public records, the inspection of which petitioners were under a legal duty to permit. *Wilson* v. *United States*, 221 U. S. 361, 383–384; *Bowles* v. *Insel*, 148 F. 2d 91 (C. C. A. 3); *Rodgers* v. *United States*, 138 F. 2d 992 (C. C. A. 6); *Fleming* v. *Montgomery Ward & Co.*, 114 F. 2d 384 (C. C. A. 7), certiorari denied, 311 U. S. 690. Access to the records was not obtained by stealth or force. Petitioners yielded them, at first without objection and later under protest.[4] And since petitioners were under a legal obligation to surrender the records for inspection, the investigation did not bear the slightest resemblance to the

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[3] This is shown by the receipt given by the Clerk (Appendix B, *infra*, pp. 23–26) for the evidence which the district court ordered suppressed and which the circuit court of appeals ordered impounded pending appeal.

[4] The court below stated (R. 486) that the affidavits "of the individual defendants are neither forthright nor clear; as regards the matter of consent, their contents are vague and argumentative to the point of evasiveness. Assuming that the threats of dire consequences were made as charged, it is hardly credible that these experienced businessmen, with counsel at their elbow, understood them in any other sense than that statutory sanctions would be invoked or legal steps taken to compel the production of the sales records if voluntary access to them were refused."

unreasonable searches and seizures condemned in the cases on which petitioners rely. No constitutional rights of the petitioners were invaded nor is the decision of the court below to be construed as sanctioning or permitting any such invasion.

CONCLUSION

The decision below is correct and there is no conflict. Consequently, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1945.